IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT, IN AND FOR UTAH COUNTY, STATE OF UTAH.

Provo Reservoir Company, a corporation, Plaintiff, -vs- Provo City, et al, Defendants.	No. 2888 Civil. BRIEF ON MOTION FOR CHANGE OF TRIAL JUDGE.

The Utah statutes do not specify the interest that disqualifies the judge from sitting in trial of an action. The statute, Compiled Laws 1917, reads as follows:-

"Sec. 1785. WHEN DISQUALIFIED. Except by consent of all parties, no justice, judge, nor justice of the peace shall sit or act as such in any action or proceeding:

1. To which he is a party, or in which he is interested;
2. When he is related to either party by consanguinity or affinity within the third degree, computed according to the rules of law;
3. When he has been attorney or counsel for either party in the action or proceeding.

But the provisions of this action shall not apply to the arrangement of the calendar or the regulation of the order of business, nor to the power of transferring the action or proceeding to some other court."

This leaves the matter of interest that will disqualify the judge as it was at common law, unless our courts have held to the contrary. We can find no case in the reports of our state defining the interest that will disqualify a judge.

Section 6799 Compiled Laws 1917, disqualifies one as a juror who has a pecuniary interest in the event of the action, except his interest as a member or citizen of a municipal corporation.

Nothing is said in relation to being a tax payer. One might be a member or citizen or another municipal corporation than the one a party to the action, but hold taxable property interests within the corporation which is a party to the action and thereby be disqualified because of interest in the result of the action.

"With regard to the degree of interest to disqualify a judge, it may be stated as a general rule, both at common law and under the statute that the degree is immaterial, and that where the interest of the judge in the case is of a nature to disqualify, it will bar him from sitting in such case, however small or trivial it may be."

Am. & Eng. Ency. of Law, 2nd Ed. Vol. 17, 740, dd.
Citing: Many cases, including State -vs- Hocker, 34 Fla. 25, and others.

"A judge who, previous to his commission, has acted as attorney in a case is disqualified to adjudicate not only all matters arising in that identical case, but all supplemental matters or proceedings had or taken to enforce or resist the enforcement of any judgment or decree rendered in such case." Ib. 740. "3" Sub.

In the Cal. case, Myer -v- City of San Diego, the judge was held to be disqualified because he was a taxpayer. 53 Pac. 434.

"The strict common law rule was adopted in this country as one to be enforced where nothing but the common law controlled, and citizens and taxpayers have been held incompetent to sit in suits against the municipal corporation of which they are residents."

Citing:

Tumey -v- Ohio. Adv.Sheets of U. S.Reports No.10,April 1,1927.
Deviny -v- Elmira, 51 N. Y. 506;
Corwein -v- Hames, 11 Johns, 76;
Clark -v- Allen, 2 Allen, 396;
Dively -v- Cedar Falls, 21 Iowa, 565;
Fulweiler -v- St. Louis, 61 No. 479;
New Boston's Petition, 49 N. H. 328;
Com. -v- McLane 4 Gray, 427;
Fine -v- St. Louis Public Schools, 30 Mo. 166-172.

In the case of Tumey -v- Ohio, ib. The matter of jurisdiction of one a resident of the municipality, is discussed at length, on pages 514 to 516, and seem to be conclusive that he is disqualified, where there is no statute to the contrary. The state of Utah has no statute to the contrary.

Judge sitting in another district. Compiled Laws 1917:-

"Sec. 1676. Any district judge may hold a district court in any county at the request of the judge of the district, and upon the request of the governor, it shall be his duty to do so; and in either case the judge holding the court shall have the same power as the judge thereof."
Const. Art. 8, Sec. 5.

"Under Sess. Laws 1891, p. 141 (3 Mills' Ann. St. 1038), authorizing a judge to call in a judge from another district for any purpose which seems proper to him, it is the duty of a judge who has been counsel for one of the parties in a matter being litigated in his court to call in another judge.-- Sterling No. 2 Ditch Co. -v- Iliff & Platte Valley Ditch Co. 52 P. 669. 24 Colo. 491."

This Colorado case seems to be directly in point with the case at bar. The trial of the cause occupied some seven years. After the decree was entered a rehearing was had and additional evidence taken. A change of venue was granted, but instead of transferring the cause to another district for hearing, the judge, under the statute authorizing him so to do, called a judge from another district to sit in trial of the case in the same court. On appeal this was assigned as error. The appellate court on P. 670 says:-

"Whether the Code provision with reference to change of venue is applicable or not, the action of the district court in calling in another judge was eminently proper. He had been of counsel for the appellant company in the very matter which was being litigated in his court, and it was his duty, even in the absence of an application by the appellee therefor, voluntarily to refrain from participating in the hearing, and of his own motion to call in a judge from another district."

Very respectfully submitted,

A. C. Hatch and
Booth Bowden
Attorneys for plaintiff.